IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 30.08.2006

Coram

The Honourable Mr. JUSTICE K.MOHAN RAM

C.M.A. No.1735 of 1999

The Regional Director
E.S.I.Corporation
143, Sterling Road
Madras - 600 034. .... Appellant(Respondent)

- Vs.-

M/s. Premier Suppliers Pvt. Ltd.,
having its Registered Office at
8, India Exchange Place
Calcutta - 1,
Represented by its Manager .... Respondent(Petitioner)

Appeal against the order of the Learned Principal Judge, City Civil Court, Chennai (The Employees' State Insurance Judge, Chennai) dated 09.05.1997 made in E.S.I.O.P.No.10 of 1992.

For Appellant : Mr. G.Desappan.
For Respondent : Mr. P.Mathivanan.

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J U D G E M E N T

Being aggrieved by the order dated 09.05.1997 passed in E.S.I.O.P.No.10 of 1992 by the Principal Judge, (The Employees' State Insurance Judge), City Civil Court, Chennai, the Regional Director, E.S.I. Corporation, Chennai - 34, who was the respondent in the Original Petition has filed the above appeal.

2. The respondent herein filed E.S.I.O.P.No.10 of 1992 under Section 75 of the Employees' State Insurance Act, 1948 (hereinafter referred to as "the Act") to set-aside the order under Section 45-A dated 22.02.1991 / 12.03.1991 claiming a sum of Rs.41,825.85 towards contribution for the period from 16.01.1977 to September 1985 and also seeking refund of Rs.18,045/- paid on 26.03.1991. The substantial questions of law that are raised in the above appeal are,

(i) Whether the claim for contribution prior to 16.06.1984 is barred by limitation, as held by the E.S.I. Court?
(ii) Whether the order of the E.S.I. Court in remanding the matter to E.S.I. Corporation to decide afresh can be sustained in law?

2. Though the above said two questions of law have been raised, the learned counsel for the appellant confined his submissions only to the question of law relating to limitation and no submissions were

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made in respect of the other question of law. In other words, the learned counsel for the appellant fairly submitted that if the question of law relating to limitation is answered in favour of the appellant, the matter has to be sent back to the Corporation for fresh consideration as directed by the E.S.I. Court.

3. The short facts that are necessary for deciding the questions of law involved in this appeal are set out below:

The appellant issued C-18 notice dated 17.06.1987 for the period from 01.06.1977 to September 1985 claiming a sum of Rs.41,825.85 by way of contribution in respect of the branch offices at Madurai, Sivakasi and Coimbatore and subsequently passed an order under Section 45-A determining the very same amount by way of contribution. According to the respondent, a sum of Rs.18,045/- alone has to be contributed and the same was remitted on 26.03.1991. The respondent sent a representation contending that no further amount is payable, but the said contention was rejected by the appellant and the respondent was called upon to pay the balance amount. Therefore, the respondent has filed the above said Original Petition.

4. Before the Court below, the respondent examined P.W.1-Thiru.Subramaniam and got Exs.A-1 to A-10 marked and on the side of the appellant, R.W.1-P.V.Santhakumar was examined and Exs.B-1 to B-6 were marked. On a consideration of the oral and documentary evidence available on record, the Court below in view of the fact that the demand was made only on 17.06.1987 held that the claim of the Corporation will be within time only for the period from 16.06.1984 and the amount due for the earlier period is virtually barred by time and further held that the Corporation is not entitled to claim any amount prior to 16.06.1984. But, however the Court below held that since the respondent had already remitted the amount on the basis of actual, it is not entitled to get back the amount already deposited by it.

5. Heard Mr. G.Desappan learned counsel for the appellant and Mr.P.Mathivannan learned counsel for the respondent.

6. The learned counsel for the appellant by relying upon two Division Bench Judgements of this Court reported in 1999 (2) L.W.762 (The Regional Director, E.S.I., Corporation Madras - 34 Vs. M/s. Henry Woleey and Company, Prop. S.Murugesan Family Trust, by Trustee Executor, Salem) and 2006 (2) C.T.C. 1 (Cosmopolitan Club, 63 Anna Salai, Chennai - 2, Rep. by its Hon. Secretary Vs. The Deputy Director, Regional Office (Tamil Nadu), Employees State Insurance Corporation, 143 Sterling Road, Nungambakkam, Chennai - 600 034) submitted that the period of limitation prescribed under Section 77 (1-A)(b) of the Act is not applicable to the adjudication proceedings under Section 45-A of the Act.

7. Per contra Mr. P.Mathivanan, learned counsel for the respondent places reliance on the Full Bench decision of the Kerala High Court reported in 2003 (3) L.L.J. 768 (Regional Director, E.S.I. Corporation Vs. Kerala Electrical and Allied Engineering Co. Ltd. and

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others) and submitted that as per the proviso to Section 77(1-A)(b) of the Act, the claim for contribution has to be made within five years from the date on which the claim was made and any claim made beyond the said period is not tenable.

8. In 1999 (2) L.W. 762 (referred to supra), the Division Bench of this Court, in paragraph 7, on a consideration of the scope of the proviso to Section 77(1-A) of the Act, has laid down as follows:

> "7. ..... We are of the opinion that the proviso cannot independently give any meaning without reference to the main provision, Sec.77 of the Act relates to commencement of proceedings before the Employees Insurance Court. Sub-Section (1-A) prescribes the period of limitation. Clause(b) of sub-section (1-A) of Sec. 77 of the Act says that in respect of a claim by the Corporation for recovering contribution, the cause of action shall be deemed to have arisen on the date on which such claim is made by the Corporation for the first time. It is under clause (b), a proviso is added and the proviso is as follows:-
> "Provided that no claim shall be made by the Corporation after five years of the period to which the claim relates."
> We have absolutely no hesitation in holding that the proviso will apply only in respect of a claim made by the Corporation before the Insurance Court. We are supported in our view by the decision of a Division Bench of this Court in A.A.O.No.60 of 1980 dated 13.02.1980 (The Pondicherry Co-operative Milk Producers Union Limited represented by the Managing Director Vs. The Regional Director of Employees State Insurance Corporation). The following passage is of consideration relevance
> "The fourth point urged before the lower court was that the claim was barred by limitation. The employees State Insurance Act 1948 does not provide for a period of limitation for recovery of the amount due from a defaulting employer, and the only period of limitation prescribed is in Section 77 and that applied only to the filing of an application before the Employees State Insurance Court under Section 75, and in the present case, it was the appellant which had filed the application, and if there is any question of bar of limitation, then it was for the appellant's application which was liable to be dismissed".
> Therefore, the second point decided by the learned single Judge against the appellant-Corporation is also reversed and it is held that the claim and demand under Sec.45-A of the Act is not barred by limitation."

9. In 2006 (2) C.T.C. 1 (referred to supra), another Division Bench of this Court held as follows:-

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> "50. Section 77 of the Act relates to commencement of

proceedings before the E.S.I. Court. The proviso to sub-section (1-A) of Section 77 of the Act cannot independently give any meaning without reference to the main provision, namely Section 77 of the Act. Therefore, the proviso to Clause (b) of Section 77(1-A) of the Act, fixing the period of five years for the claim made by the Corporation, will apply only in respect of claim made by the Corporation before the Insurance Court.

.....

(1) Having regard to the scheme and object of the Act, while interpreting the provisions so as to advance the remedy and not to defeat and also in keeping with the principles enunciated in the decisions rendered by the Supreme Court, we are of the considered opinion, that the period of limitation, prescribed under Section 77 (1-A)(b) of the Employees' State Insurance Act, 1948, would not apply to the recovery proceedings under Section 45-B of the Act, in pursuance of an order under Section45-A. However, the appellants are at liberty to approach the E.S.I. Court, to question the order under Section 45-A, as directed by the learned single Judge".

10. Further, in 2006 (1) C.T.C. 1, the Full Bench decision of the Kerala High Court reported in the case of ESI Corporation Vs. Excel Glasses Ltd. 2003 (3) L.L.N. 1142 equivalent to 2003(3) L.L.J. 768 (referred to supra) has been considered and the following observation has been made:-

"Hence, we are constrained to take the view, with much regret but with great respect, that the Full Bench of Kerala High Court has not made a correct approach and, as such, we do not agree with the same".

11. Therefore the above two Division Bench judgements of this Court has to be followed by me. If the law laid down by the above said two Division Bench Judgements of this Court is applied to the facts of this case, the first question of law relating to limitation has to be answered in favour of the appellant. Accordingly, this Court holds that Section 77(1-A)(b) of the Act, does not fix time limit within which the ESI Corporation can make claim from employer on the basis of order made under Section 45-A of the Act.

12. Therefore, the order of the Court below in that regard on the question of limitation has to be set-aside and accordingly set-aside. Since as pointed out above, the order of the Court below remitting the matter back for fresh determination is not challenged, that part of the order is confirmed.

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13. In view of the above, the Corporation has to decide the matter afresh after giving sufficient opportunity to the parties in the light of the directions issued by the Court below. The appeal is partly allowed as indicated above. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

srk

To

1. The Principal Judge,
(The Employees' State Insurance Judge),
City Civil Court, Chennai,

2. The Regional Director,
E.S.I.Corporation
143, Sterling Road,
Chennai - 600 034.

3.The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr.S.Rajasekar, Advocate Sr 39192
+1cc to Mr.G.Desappan, Advocate Sr 39241

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